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## Review by the Civil Courts of Judgments of Federal Military Tribunals

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The appellate jurisdiction given the Supreme Court of the United States by Article III of the Constitution does not include appellate review of judgments of military tribunals, by certiorari or otherwise.<sup>1</sup> Congress has not authorized the civil courts to exercise appellate jurisdiction over military tribunals.<sup>2</sup> It follows that the civil courts have no appellate power over military tribunals and may review their judgments, if at all, only by way of collateral attack based on the tribunal's want of jurisdiction.<sup>3</sup> In the case of general courts-martial of the Army and Air Force Congress has provided an elaborate system of appellate review within the serv-

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<sup>1</sup> *Ex parte Vallandigham*, 1 Wall. 243 (U.S. 1863); *Ex parte Mason*, 105 U.S. 696 (1882); *In re Vidal*, 179 U.S. 126 (1900).

<sup>2</sup> The Administrative Procedure Act expressly excepts the conduct of military and naval functions from its requirements of fair hearing prior to adjudication and excepts courts-martial, military commissions and military or naval authority exercised in the field in time of war or in occupied territory from its provisions for judicial review. §§2, 5, Act of June 11, 1946, 60 STAT. 237, 239, 5 U.S.C. §§1001, 1004.

<sup>3</sup> *Dynes v. Hoover*, 20 How. 65 (U.S. 1857); *Carter v. Roberts*, 177 U.S. 496 (1900); *In re Yamashita*, 327 U.S. 1 (1946).

ices<sup>4</sup> and has recently declared that sentences so reviewed shall be final and conclusive and action taken pursuant thereto shall be binding upon all courts of the United States.<sup>5</sup> The law of collateral attack in the absence of this statutory declaration will first be considered and the effect of the declaration will be discussed in the last section of this study.

The commonest form of collateral attack on military judgments is by habeas corpus but some other types are possible, including suit against the United States for pay or allowances forfeited by sentence of military tribunal<sup>6</sup> and civil action for damages in a federal or state court against the individuals who carry out the judgment of such a tribunal.<sup>7</sup> As a valid judgment of a court-

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<sup>4</sup> §§223-230, Title II, Act June 24, 1948, 62 STAT. 634-639, 10 U.S.C.A. §§1518-1525; Act June 25, 1948, 62 STAT. 1014, 5 U.S.C.A. §627k. See Fratcher, *Appellate Review in American Military Law*, 14 MO. L. REV. 15-75 (1949).

<sup>5</sup> "The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53." A.W. 50, §226, Title II, Act June 24, 1948, 62 STAT. 635, 10 U.S.C.A. §1521. See also A.W. 53, §230, 62 STAT. 638, 10 U.S.C.A. §1525, note 17, *infra*.

These provisions became effective February 1, 1949. Legislation which would extend them to naval courts-martial is pending. Sec. 76, H.R. 4080, 81st Cong. (1949).

<sup>6</sup> *Runkle v. United States*, 122 U.S. 543 (1887); *United States v. Brown*, 206 U.S. 240 (1907); *Shilman v. United States*, 164 F. 2d 649 (2d Cir. 1947), *cert denied*, 333 U.S. 837 (1948). The usefulness of this remedy is limited by the statute of limitations and by doctrines that the appointment and confirmation of a successor vacates military office notwithstanding the invalidity of a court-martial sentence of dismissal [*Blake v. United States*, 103 U.S. 227 (1880)] and that acquiescence by an officer on the active list in his dismissal bars recovery. *Ide v. United States*, 25 Ct. Cl. 401 (1890), *aff'd*, 150 U.S. 517 (1893); *Armstrong v. United States*, 26 Ct. Cl. 387 (1891), *aff'd*, 159 U.S. 246 (1895). *McLean v. United States*, 73 F. Supp. 775 (W.D. S.C. 1947) applied to a court-martial judgment a federal statute authorizing suit against the United States for damages for imprisonment under a sentence reversed on appeal.

<sup>7</sup> *Wise v. Withers*, 3 Cranch 331 (U.S. 1806); *Martin v. Mott*, 12 Wheat. 19 (U.S. 1827); *Wilkes v. Dinsman*, 7 How. 89 (U.S. 1848); *Dynes v. Hoover*, 20 How. 65 (U.S. 1857); *Milligan v. Hovey*, Fed. Cas. No. 9,605 (C.C. D. Ind. 1871); *Waters v. Campbell*, Fed. Cas. No. 17,265 (C.C. D. Ore. 1877); *Zimmerman v. Poindexter*, 78 F. Supp. 421 (Hawaii 1947). See Stein, *Judicial Review of Determinations of Federal Military Tribunals*, 11 BROOKLYN L. REV. 30, 32-35 (1941).

martial is a bar to prosecution in a federal civil court for the same offense, such a prosecution is a method of testing the validity of a military judgment.<sup>8</sup> Attempts to attack judgments of military tribunals by prohibition, injunction and suit for declaratory judgment have been unsuccessful but there may be situations in which prohibition would be a proper remedy.<sup>9</sup>

As state courts have no power to discharge on habeas corpus persons held under claim or color of the authority of the United States they may not inquire by habeas corpus into the validity of a sentence of a federal military tribunal.<sup>10</sup> The original jurisdiction of the Supreme Court of the United States is limited to cases affecting ambassadors, other public ministers and consuls, and those in which a state is a party and its power to entertain an original proceeding in habeas corpus is restricted to cases of these types.<sup>11</sup> As it may issue writs of habeas corpus in other types of cases only in aid of its appellate jurisdiction and it has no appellate jurisdiction over military tribunals, the court cannot inquire into the lawfulness of confinement under sentence of a military tribunal except on appeal from an inferior federal civil court.<sup>12</sup> United States courts of appeals may issue writs of habeas corpus only in aid of their appellate jurisdiction, which does not extend to military tribunals, so they, too, may inquire into judgments of military tribunals by habeas corpus only on appeal from an inferior federal court.<sup>13</sup> It follows that only United States district courts may en-

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<sup>8</sup> *Grafton v. United States*, 206 U.S. 333 (1907); *Johnsen v. United States*, 41 F. 2d 44 (9th Cir. 1930), *cert. denied*, 282 U.S. 864 (1930). *Cf. United States v. Praeger*, 149 Fed. 474 (W.D. Texas 1907) (criminal prosecution of civilian for refusal to testify before a court-martial); *United States v. MacKenzie*, Fed. Cas. No. 18,313 (S.D. N.Y. 1843) (criminal prosecution for offense for which defendant was in process of trial by court-martial).

<sup>9</sup> Prohibition: *Smith v. Whitney*, 116 U.S. 167 (1886); *United States v. Maney*, 61 Fed. 140 (C.C. D. Minn. 1894); *see Ex parte Henderson*, Fed. Cas. No. 6,349 (C.C. D. Ky. 1878). Injunction: *Carter v. Woodring*, 92 F. 2d 544 (D.C. Cir. 1937), *cert. denied*, 302 U.S. 752 (1937); *In re Meader*, 60 F. Supp. 80 (E.D. N.Y. 1945) (motion to suppress evidence in pending trial before court-martial). *Cf. Sterling v. Constantin*, 287 U.S. 378 (1932). Declaratory judgment: *Brown v. Royall*, 81 F. Supp. 767 (D.D.C. 1949).

<sup>10</sup> *United States v. Booth*, 21 How. 506 (U.S. 1858); *Tarble's case*, 13 Wall. 397 (U.S. 1871).

<sup>11</sup> *Ex parte Barry*, 2 How. 65 (1844).

<sup>12</sup> *Ex parte Betz and companion cases*, 329 U.S. 672 (1946); *In re Krautwurst and companion cases*, 334 U.S. 826 (1948); *In re Gronwald*, 334 U.S. 857 (1948). *Cf. Ex parte Mason*, 105 U.S. 696 (1882). The Court can entertain appeals from inferior federal courts in habeas corpus cases. *Ex parte Yerger*, 8 Wall. 85 (U.S. 1868).

<sup>13</sup> *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Price v. Johnston*, 334 U.S. 266 (1948). Findings of the fact made by the district court and supported by evidence will not be disturbed on appeal. *Schita v. Cox*, 139 F. 2d 971 (8th Cir. 1944), *cert. denied sub. nom. Schita v. Pescor*, 322 U.S.

tain original proceedings in habeas corpus to obtain release from confinement under sentences of federal military tribunals.

A district court may not entertain a habeas corpus proceeding unless the prisoner is confined within its district.<sup>14</sup> Consequently a person in confinement under sentence of a military tribunal in a foreign country or elsewhere not within the territorial jurisdiction of a district court has no remedy by habeas corpus.<sup>15</sup> In the absence of special circumstances, available remedies by way of appeal must be exhausted before seeking release by habeas corpus.<sup>16</sup> This rule would seem to require a prisoner under sentence of Army or Air Force general court-martial to await final military appellate review of his sentence and to petition the Judge Advocate General for a

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761 (1944), *rehearing denied*, 323 U.S. 810 (1944).

<sup>14</sup> *Ahrens v. Clark*, 335 U.S. 188 (1948). *Cf. Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

<sup>15</sup> *McGowan v. Moody*, 22 App. D.C. 148 (1903) (Guam); *Ex parte Flick*, 76 F. Supp. 979 (D.C. 1948) (Germany), *aff'd on other grounds*, *Flick v. Johnsen*, 174 F. 2d 983 (D.C. Cir. 1949), *cert. denied*, 70 S. Ct. 158 (1949). *Contra: Eisentrager v. Forrestal*, 174 F. 2d 961 (D.C. Cir. 1949), *cert. granted sub. nom. Johnsen v. Eisentrager*, 70 S.Ct. 158 (1949); *In re Bush*, Hab. Corp. No. 3,544, D.C., June 21, 1949; Concurring opinion of Douglass, J. in *Koki Hirota v. MacArthur*, 69 S. Ct. 1,238 (1949). See *G.I.'s Overseas and Habeas Corpus*, 1 STANFORD L. REV. 555-559 (1949). But see Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STANFORD L. REV. 587, 631-643 (1949). United States courts have no power to review in any way the sentence of a military tribunal appointed by an officer of the United States forces acting under authority of the United States and allied foreign powers. *Koki Hirota v. MacArthur*, 69 S. Ct. 197 (1948), *rehearing denied*, 69 S. Ct. 1238 (1949). See Fairman, *op. cit.*, 589-603.

<sup>16</sup> *In re Lincoln*, 202 U.S. 178 (1906). See *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 664-667 (1948).

<sup>17</sup> "Under such regulations as the President may prescribe, the Judge Advocate General is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49 and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceed-

new trial or other relief under Article of War 53<sup>17</sup> before seeking habeas corpus in a district court.<sup>17a</sup>

It was early determined that, as military tribunals are courts of special and limited jurisdiction, their judgments are somewhat more vulnerable to collateral attack for want of jurisdiction than those of civil courts of general jurisdiction.<sup>18</sup> Nevertheless, the rule that the record of a court of special and limited authority is void on its face unless it shows all jurisdictional requisites<sup>19</sup> is not applied to records of military tribunals. The judgment of a military tribunal will not be disturbed, despite the failure of its record to show jurisdictional requisites, if, as a matter of fact, it had jurisdiction.<sup>20</sup> In general the subjects open to inquiry by a civil court in a collateral attack on a judgment of a military tribunal are: (1) whether the tribunal was legally constituted; (2) whether it had jurisdiction of the person; (3) whether it had jurisdiction of the subject matter; (4) whether its sentence was conformable to law; and (5) whether its procedure complied with statutory or executive regulations of a jurisdictional nature.<sup>21</sup> In short, the inquiry is limited to the question of whether the military tribunal had jurisdiction to hear the case before it and to render the judgment; no question of error in the exercise of jurisdiction being reviewable on collateral attack.<sup>22</sup> The scope of inquiry under each of the mentioned heads will be examined in the order in which they are enumerated.

### CONSTITUTION OF THE MILITARY TRIBUNAL

Under the English law in force at the time of the American Revolution the constitution, jurisdiction and procedure of courts-

ings, shall be binding upon all departments, courts, agencies and officers of the United States." A.W. 53, §230, Act June 24, 1948, 62 STAT. 639, 10 U.S.C.A. §1525. See Fratcher, *op. cit.* note 4, *supra*, 68.

<sup>17a</sup> *Whelchel v. McDonald*, 176 F. 2d 260 (5th Cir. 1949); *Spencer v. Hunter*, 177 F. 2d 370 (10th Cir. 1949); *Massey v. Humphrey*, 85 F. Supp. 534 (M.D. Pa. 1949); *Contra: Burchfield v. Hiatt*, 86 F. Supp. 18 (N.D. Ga. 1949).

<sup>18</sup> *Wise v. Withers*, 3 Cranch 331 (U.S. 1806); see *Ex parte Watkins*, 3 Pet. 193 (U.S. 1830).

<sup>19</sup> *Galpin v. Page*, 18 Wall. 350 (U.S. 1873).

<sup>20</sup> *Givens v. Zerbst*, 255 U.S. 11 (1921); *United States ex rel. Hartley v. Malanaphy*, 81 F. Supp. 316 (E.D. N.Y. 1948).

<sup>21</sup> *Martin v. Mott*, 12 Wheat. 19 (U.S. 1827); *Dynes v. Hoover*, 20 How. 65 (U.S. 1857); *Runkle v. United States*, 122 U.S. 543 (1887); *Carter v. Roberts*, 177 U.S. 496 (1900); *McClaghry v. Deming*, 186 U.S. 49 (1902); *Collins v. McDonald*, 258 U.S. 416 (1922).

<sup>22</sup> *Waite v. Overlade*, 164 F. 2d 722 (7th Cir. 1948), *cert. denied*, 334 U.S. 812 (1948). Compare *United States ex rel. Innes v. Hiatt*, 141 F. 2d 664 (3d Cir. 1944), taking the position that the scope of inquiry on collateral attack has recently been broadened to include questions other than jurisdiction. This assertion will be discussed *infra*.

martial, the type of military tribunal used to enforce the internal discipline of the forces, were governed partly by statute and partly by executive regulation; military tribunals established for other purposes were not governed by statute. The Federal Constitution adopted the existing English scheme, empowering Congress to make rules for the government and regulation of the land and naval forces but making no specific provision as to military tribunals set up for other purposes. Whether Congress has power to limit the authority of the President, as Commander-in-Chief, to establish military tribunals (usually called military commissions, provost courts or military government courts) to carry out military government of occupied enemy territory, execute martial rule of domestic territory disturbed by war or insurrection, or enforce the laws of war, is an undecided question.

Incident to collateral attack on a judgment of a military tribunal a civil court may inquire whether the officer who appointed the tribunal had lawful authority to do so.<sup>23</sup> In the case of courts-martial this inquiry is usually as to whether the appointing authority was authorized by statute to appoint such a court<sup>24</sup> or was authorized by the President pursuant to statute to do so<sup>25</sup> but, although the constitution of courts-martial is, in general, regulated by statute, the President himself may appoint courts-martial without statutory authority.<sup>26</sup> The authority of the officer appointing the tribunal need not be shown by the record of the tribunal but may be established by evidence in the civil court.<sup>27</sup> The order appointing the tribunal need not be signed by the appointing authority, it being sufficient that it is issued by his direction.<sup>28</sup>

As the President and superior field commanders have virtually plenary authority without statutory warrant to appoint military tribunals with criminal and civil jurisdiction, or both, incident to the military government of occupied enemy or rebel territory, the scope of inquiry in such cases is limited to the question of whether

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<sup>23</sup> *Pennywit v. Eaton*, 15 Wall. 382 (U.S. 1873); *Mechanic's and Trader's Bank v. Union Bank*, 22 Wall. 276 (U.S. 1874); *United States v. Smith*, 197 U.S. 386 (1905); *Givens v. Zerbst*, 255 U.S. 11 (1921).

<sup>24</sup> *United States v. Smith*, note 23, *supra*; *In re Crain*, 84 Fed. 788 (C.C. D. Mass. 1897). Where a statute provides that, when the normal appointing authority is the accuser or prosecutor, the court shall be appointed by superior authority, it would seem that a civil court may inquire whether the appointing authority was the accuser or prosecutor. *United States ex rel. Williams v. Barry*, 260 Fed. 291 (S.D. N.Y. 1919).

<sup>25</sup> *Givens v. Zerbst*, note 23, *supra*; *In re Crain*, note 24, *supra*.

<sup>26</sup> *Swaim v. United States*, 165 U.S. 553 (1897).

<sup>27</sup> *Givens v. Zerbst*, note 23, *supra*. The Court took judicial notice of a War Department general order by which the President delegated power of appointment.

<sup>28</sup> *McRae v. Henkes*, 273 Fed. 108 (8th Cir. 1921), *cert. denied sub. nom. Henkes v. McRae*, 258 U.S. 624 (1922).

the tribunal was in fact appointed by the President or such a commander.<sup>29</sup> This is true also in the case of military tribunals appointed to try enemy persons for violations of the laws of war, whether in domestic or foreign territory.<sup>30</sup> On the other hand, as the authority of the President and superior field commanders to appoint military tribunals for the trial of civilians in domestic territory is limited to situations in which, by reason of war or insurrection, the civil courts cannot function and military necessity requires such appointment, a civil court may inquire into the factual necessity of using such tribunals and is not precluded by the President's or the field commander's determination that military necessity existed.<sup>31</sup>

If the composition of a court-martial is fixed by statute at not less than a specified number of members, a civil court may inquire on collateral attack whether the court-martial had that many members.<sup>32</sup> Likewise, if a statute provides that a certain class of persons shall not be eligible to sit on courts-martial, a civil court may inquire whether persons of that class did sit and, if so, declare the proceedings void, even though the accused did not object to the membership of the court-martial.<sup>33</sup> When the court-martial is required by statute to be composed of officers of the command of the appointing authority, the question of whether the members were officers of that command may be raised.<sup>34</sup> A recent decision

<sup>29</sup> *Cross v. Harrison*, 16 How. 164 (U.S. 1853) (holding that such authority continued in conquered territory after the ratification of a treaty of peace and until Congress provided a civil government); *Leitensdorfer v. Webb*, 20 How. 176 (U.S. 1857); *The Grapeshot*, 9 Wall. 129 (U.S. 1869); *Pennywit v. Eaton*, 15 Wall. 382 (U.S. 1873); *Mechanic's and Trader's Bank v. Union Bank*, 22 Wall. 276 (U.S. 1874); *Ex parte Ortiz*, 100 Fed. 955 (C.C. D. Minn. 1900) (stating, by way of dictum, contrary to *Cross v. Harrison*, *supra*, that the authority terminated upon ratification of a treaty of peace and cession); *United States v. Reiter*, Fed. Cas. No. 16,146 (Prov. Ct., La. 1865).

<sup>30</sup> *United States ex rel. Quirin v. Cox*, 317 U.S. 1 (1942) (the Court relied to some extent on a statute, A.W. 15, which recognized the jurisdiction of military commissions, but did not hold that statutory sanction is required); *In re Yamashita*, 327 U.S. 1 (1946); *Homma v. Patterson*, 327 U.S. 759 (1946). See *United States ex rel. Wessels v. McDonald*, 265 Fed. 754 (E.D. N.Y. 1920), *cert. dism. sub. nom. Wessels v. McDonald*, 256 U.S. 705 (1921).

<sup>31</sup> *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *In re Egan*, Fed. Cas. No. 4,303 (C.C. N.D. N.Y. 1866). See *Ex parte Vallandigham*, 1 Wall. 243 (U.S. 1863); *Sterling v. Constantin*, 287 U.S. 378 (1932); *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash. 1943). Cf. *Ex parte Mudd*, Fed. Cas. No. 9,899 (S.D. Fla. 1868).

<sup>32</sup> *McDaniel v. Hiatt*, 78 F. Supp. 573 (M.D. Pa. 1948).

<sup>33</sup> *McClaughey v. Deming*, 186 U.S. 49 (1902) (habeas corpus); *United States v. Brown*, 206 U.S. 240 (1907) (suit for pay); *Walsh v. United States*, 43 Ct. Cl. 225 (1908). These cases arose under a statutory provision that "officers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces . . ."

<sup>34</sup> *Durant v. Hiatt*, 81 F. Supp. 948 (N.D. Ga. 1948).

suggests that, even in the absence of statutory prohibition, the systematic exclusion of persons of a particular race from a court-martial may be a ground for collateral attack, but this is most doubtful.<sup>35</sup>

On the other hand, if the governing statute gives the appointing authority some latitude for the exercise of judgment as to the proper composition of a court-martial, a civil court will not review his decision. For example, if a statute provides that a court-martial shall not consist of less than thirteen members where that number can be convened without manifest injury to the service and a court-martial of less than thirteen members is convened, a civil court will not go into the question of whether thirteen members could have been detailed without manifest injury to the service.<sup>36</sup> Similarly, if a statute provides that no officer shall, when it can be avoided, be tried by officers inferior to him in rank, a civil court will not inquire whether a trial by juniors could have been avoided.<sup>37</sup> So, where a statute provides that the law member of a court-martial shall be an officer of the Judge Advocate General's Department, except when an officer of that department is not available for the purpose, a civil court may not question the appointment of an officer of another branch as law member even though officers of the Judge Advocate General's Department are appointed to the prosecution and defense staffs of the court-martial.<sup>38</sup>

A civil court may not inquire into the question of whether a member of a court-martial was subject to challenge for cause, whether or not the question was raised before the court-martial.<sup>39</sup> This restrictive rule has been applied even in the flagrant case of the officer who signed the charges acting as a witness for the prose-

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<sup>35</sup> *Jackson v. Gough*, 170 F. 2d 630 (5th Cir. 1948), *cert. denied sub. nom. Jackson v. United States*, 336 U.S. 938 (1949) (the court found that there was no systematic exclusion and denied release on habeas corpus).

<sup>36</sup> *Martin v. Mott*, 12 Wheat. 19 (U.S. 1827); *Mullan v. United States*, 140 U.S. 240 (1890); *Bishop v. United States*, 197 U.S. 334 (1905); *Kahn v. Anderson*, 255 U.S. 1 (1921); *In re Crain*, 84 Fed. 788 (C.C. D. Mass. 1897).

<sup>37</sup> *Mullan v. United States*, 140 U.S. 240 (1890); *Swaim v. United States*, 165 U.S. 553 (1897).

<sup>38</sup> *Henry v. Hodges*, 171 F. 2d 401 (2d Cir. 1948), *cert. denied*, 69 S. Ct. 937 (1949), *rehearing denied sub. nom. Henry v. Smith*, 69 S. Ct. 1167 (1949); *Glenn v. Hodges*, 79 F. Supp. 400 (S.D. N.Y. 1948). *Contra: Brown v. Hiatt*, 81 F. Supp. 647 (N.D. Ga. 1948), *aff'd sub. nom. Hiatt v. Brown*, civil action No. 12,641, 5th Cir., June 16, 1949. The question cannot arise under the present statute, which makes it mandatory in all cases that the law member be an officer of the Judge Advocate General's Corps or a member of the bar certified as qualified. A.W. 8, §206, Title II, Act June 24, 1948, 62 STAT. 628, 10 U.S.C.A. §1479.

<sup>39</sup> *Keyes v. United States*, 109 U.S. 336 (1883); *Swaim v. United States*, 165 U.S. 553 (1897).



cution and also as a member of the court-martial.<sup>40</sup> The court-martial record need not show the qualifications of the members. For example, if retired officers are not eligible to sit as members of courts-martial unless recalled to active duty, the court-martial record need not include the orders recalling retired members to duty; such orders may be proved in the civil court.<sup>41</sup>

### JURISDICTION OVER THE PERSON

The Fifth Amendment to the Federal Constitution prohibits trial for a capital or otherwise infamous crime without presentment or indictment of a grand jury, "except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger."<sup>42</sup> The jurisdiction of courts-martial over persons is governed by statute. As to them the inquiry is double: Is the accused a person whom the statute subjects to trial by courts-martial of this type? Is the application of the statute to this person prohibited by the Fifth Amendment? In the case of military commissions, provost courts and military government courts the inquiry is: Is the accused a person subject to trial by military tribunal under the law of war, the law of military occupation or the law of martial rule? The form of the latter inquiry assumes, of course, that there are implied exceptions to the grand jury requirement of the Fifth Amendment as well as those expressed in it.<sup>43</sup>

If a statute empowers a court-martial to try members of a particular component of the armed forces a civil court may inquire whether, as a matter of fact and law, a person tried by this court-martial was a member of that component. It may consider whether the position he held constituted membership in that component,<sup>44</sup>

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<sup>40</sup> *Keyes v. United States*, note 39, *supra*.

<sup>41</sup> *McRae v. Henkes*, 273 Fed. 108 (8th Cir. 1921), *cert. denied sub. nom. Henkes v. McRae*, 258 U.S. 624 (1922). See *Kahn v. Anderson*, 255 U.S. 1. (1921).

<sup>42</sup> The phrase, "when in active service in time of war or public danger," relates only to the militia. *Johnson v. Sayre*, 158 U.S. 109 (1894).

<sup>43</sup> Notes 29, 30, 31, *supra*.

<sup>44</sup> *Ex parte Reed*, 100 U.S. 13 (1879) (naval paymaster's clerk); *Johnson v. Sayre*, 158 U.S. 109 (1894) (naval paymaster's clerk); *McGlensy v. Van Vranken*, 163 U.S. 694 (1895), *reversing Ex parte Van Vranken*, 47 Fed. 888 (C.C. E.D. Va. 1891) (naval paymaster's clerk); *McLaughry v. Deming*, 186 U.S. 49 (1902) (volunteer officer a member of "other forces" excepted from jurisdiction of Regular Army court-martial); *In re Thomas*, Fed. Cas. No. 13,888 (N.D. Miss. 1869) (naval paymaster's clerk); *Smith v. United States*, 26 Ct. Cl. 143 (1891) (paymaster general of the Navy); *Ex parte Clark*, 271 Fed. 533 (E.D. N.Y. 1921) (marine serving with the Army). Where a statute limits court-martial jurisdiction of murder to persons belonging to a public vessel a civil court may investigate the assignment status of the accused to

whether the militia organization to which he belonged had been mustered into federal service,<sup>45</sup> and whether he was duly enlisted<sup>46</sup> or inducted<sup>47</sup> into the service, even though the question was not raised before the court-martial.<sup>48</sup> However, a person who acquiesces in an incomplete or improper induction and serves as a soldier effects a constructive enlistment which subjects him to court-martial jurisdiction despite the irregularity of his induction.<sup>49</sup> Moreover, a court-martial sentence is not subject to collateral attack on the ground that the enlistment of the accused was voidable at the suit of the government for his fraudulent misrepresentation of his qualifications for enlistment<sup>50</sup> or was voidable at the suit of his parents because of his minority and their lack of consent.<sup>51</sup> The court-martial record need not establish the military

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determine whether he belonged to a public vessel. *Rosborough v. Rossell*, 150 F. 2d 809 (1st Cir. 1945).

<sup>45</sup> *Martin v. Mott*, 12 Wheat. 19 (U.S. 1827); *Craycroft v. United States*, 48 Ct. Cl. 5 (1912).

<sup>46</sup> *Hoskins v. Pell*, 239 Fed. 279 (5th Cir., 1917) (enlistment of minor under 16 void); *McFarland v. Zuppam*, 82 F. Supp. 526 (M.D. Pa. 1949).

<sup>47</sup> *Wise v. Withers*, 3 Cranch 331 (U.S. 1806); *Billings v. Truesdell*, 321 U.S. 542 (1944); *Ex parte Beck*, 245 Fed. 967 (D. Mont. 1917); *Ex parte Dunn*, 250 Fed. 871 (D. Mass. 1918); *Ex parte Tinkoff*, 254 Fed. 912 (D. Mass. 1919); *Farley v. Ratliff*, 267 Fed. 682 (4th Cir. 1920); *Ex parte Thieret*, 26 Fed. 472 (6th Cir. 1920); *United States ex rel. Feld v. Bullard*, 290 Fed. 704 (2d Cir. 1923); *United States v. McIntyre*, 4 F. 2d 823 (9th Cir., 1925); *Ver Mehren v. Sirmyer*, 36 F. 2d 876 (8th Cir. 1929); *Curia v. Pillsbury*, 54 F. Supp. 196 (S.D. Ohio 1944); *In re Herman*, 56 F. Supp. 733 (N.D. Texas 1944); *United States ex rel. Seldner v. Mellis*, 59 F. Supp. 682 (M.D. N.C. 1945); *Ex parte Kruk*, 62 F. Supp. 901 (N.D. Cal. 1945). *Contra: Ex parte Kerekes*, 274 Fed. 870 (E.D. Mich. 1921) (validity of induction irrelevant); *Ex parte Potens*, 63 F. Supp. 532 (E.D. Wis. 1945) (court-martial's finding of jurisdiction conclusive on civil court).

<sup>48</sup> *Ver Mehren v. Sirmyer*, note 47, *supra*.

<sup>49</sup> *Ex parte Hubbard*, 182 Fed. 76 (C.C. D. Mass. 1910); *Mayborn v. Heflebower*, 145 F. 2d 864 (5th Cir. 1944), *cert. denied*, 325 U.S. 854 (1945); *Hibbs v. Catovolo*, 145 F. 2d 866 (5th Cir. 1945), *cert. denied sub. nom. Catovolo v. Hibbs*, 325 U.S. 854 (1945); *Sanford v. Callan*, 148 F. 2d 376 (5th Cir. 1945), *cert. dism. sub. nom. Callan v. Sanford*, 326 U.S. 679 (1945).

<sup>50</sup> *In re Grimley*, 137 U.S. 147 (1890).

<sup>51</sup> *In re Miller*, 114 Fed. 838 (5th Cir. 1902), *cert. denied sub. nom. Miller v. United States*, 186 U.S. 486 (1902); *In re Wall*, 8 Fed. 85 (C.C. D. Mass. 1881); *In re Davison*, 21 Fed. 618 (C.C. S.D. N.Y. 1884); *In re Zimmerman*, 30 Fed. 176 (C.C. N.D. Cal. 1887); *In re Cosenow*, 37 Fed. 668 (C.C. E.D. Mich. 1899); *In re Dohrendorf*, 40 Fed. 148 (C.C. D. Kans. 1889); *In re Spencer*, 40 Fed. 149 (D. Kans. 1889); *In re Kaufman*, 41 Fed. 876 (C.C. D. Md. 1890); *Solomon v. Davenport*, 87 Fed. 318 (4th Cir., 1898); *In re Dowd*, 90 Fed. 718 (N.D. Cal. 1898); *United States v. Reaves*, 126 Fed. 127 (5th Cir. 1903); *In re Carver*, 142 Fed. 623 (C.C. D. Me. 1906); *Ex parte Lewkowicz*, 163 Fed. 646 (C.C. S.D. N.Y. 1908); *Dillingham v. Booker*, 163 Fed. 696 (4th Cir. 1908); *Ex parte Rock*, 171 Fed. 240 (C.C. N.D. Ohio 1909); *Ex parte Hubbard*, 182 Fed. 76 (C.C. D. Mass. 1910); *Ex parte Dunakin*, 202

status of the accused so long as it existed in fact.<sup>52</sup>

If jurisdiction under the applicable statute is dependent upon active military status, a civil court may inquire whether the accused was effectively discharged from the service,<sup>53</sup> dropped from the rolls<sup>54</sup> or relieved from active duty<sup>55</sup> before the court-martial acquired jurisdiction. In such cases jurisdiction once lost is not regained, as to offenses committed before such discharge or relief from active duty, by the reenlistment or recall to active duty of the accused.<sup>56</sup> However, if the jurisdiction of a court-martial attaches while the accused is in an active military status it is not divested by his discharge from that status.<sup>57</sup> Moreover the Congress may subject reserve personnel not on active duty to trial by court-martial for offenses committed in that status or in a prior

Fed. 290 (E.D. Ky. 1913); *United States ex rel. Laikund v. Williford*, 220 Fed. 291 (2d Cir. 1915); *United States ex rel. Lazaraus v. Brown*, 242 Fed. 983 (E.D. Pa. 1917); *Ex parte Foley*, 243 Fed. 470 (W.D. Ky. 1917); *Ex parte Dostal*, 243 Fed. 664 (N.D. Ohio 1917); *Ex parte Rush*, 246 Fed. 172 (M.D. Ala. 1917); *Ex parte Beaver*, 271 Fed. 493 (N.D. Ohio 1921); *Contra: In re Baker*, 23 Fed. 30 (C.C. D. R.I. 1885); *Dillingham v. Bakley*, 152 Fed. 1022 (4th Cir. 1907); *affirming Ex parte Bakley*, 148 Fed. 56 (E.D. Va. 1906). *Cf. In re Morrissey*, 137 U.S. 157 (1890); *United States ex rel. Turner v. Wright*, Fed. Cas. No. 16,778 (C.C., W.D. Pa. 1862).

<sup>52</sup> *Givens v. Zerbst*, 255 U.S. 11 (1921).

<sup>53</sup> *In re Bird*, Fed. Cas. No. 1,423 (D. Ore. 1871) (discharge pursuant to void court-martial sentence did not prevent court-martial trial for other offenses); *United States ex rel. Harris v. Daniels*, 279 Fed. 844 (2d Cir. 1922); *Ex parte Drainer*, 65 F. Supp. 410 (N.D. Cal. 1946), *aff'd*, *Gould v. Drainer*, 158 F. 2d 981 (9th Cir. 1947); *United States ex rel. Flannery v. Commanding General, Second Service Command*, 69 F. Supp. 661 (S.D. N.Y. 1946) (administrative revocation of discharge ineffective); *Ex parte Taylor*, 73 F. Supp. 161 (D. Cal. 1947). *Cf. In re McVey*, 23 Fed. 878 (D. Cal. 1885).

<sup>54</sup> *Ex parte Wilson*, 33 F. 2d 214 (E.D. Va. 1929); *Ex parte Smith*, 47 F. 2d 257 (E.D. Va. 1931).

<sup>55</sup> *United States ex rel. Sanantonio v. Warden*, 265 Fed. 787 (E.D. N.Y. 1919); *United States ex rel. Viscardi v. MacDonald*, 265 Fed. 695 (E.D. N.Y. 1920); *Hironimus v. Durant*, 168 F. 2d 288 (4th Cir. 1948), *cert. denied sub. nom. Durant v. Hironimus*, 335 U.S. 818 (1948) (holding that placing an officer on terminal leave did not relieve her from active duty); *Durant v. Hiatt*, 81 F. Supp. 948 (N.D. Ga. 1948) (following preceding case).

<sup>56</sup> *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949) (discharge from and reenlistment the next day in the Navy); *United States ex rel. Sanantonio v. Warden*, note 54, *supra* (relief from active duty); *United States ex rel. Viscardi v. MacDonald*, note 54, *supra* (relief from active duty). The doctrine of the last two cases was questioned in *Hironimus v. Durant*, note 55, *supra*, the court suggesting that an Army reservist might be recalled to active duty and tried for offenses committed in a previous tour of active duty.

<sup>57</sup> *Barret v. Hopkins*, 7 Fed. 312 (C.C. D. Kans. 1881). *See Carter v. McClaughry*, 183 U.S. 365 (1902). *Accord: United States ex rel. Mobley v. Handy*, No. 12,853, 5th Cir., Aug. 2, 1949 (civilian accompanying the Army abroad who escaped to the United States).

status of active duty<sup>58</sup> and may do the same in the case of prisoners under sentence of court-martial who have been discharged from the service.<sup>59</sup> Likewise, Congress may authorize the trial by court-martial of persons who have been discharged from the service and have become ordinary civilians for offenses committed while in active military or naval service.<sup>60</sup> This is because, the offenses having been committed while in the service, such trials involve "cases arising in the land or naval forces" within the meaning of the Fifth Amendment.

Congress has power to subject retainers to the camp and other civilians accompanying or serving with the armies of the United States in the field or outside the United States to trial by court-martial<sup>61</sup> but military trial of such persons is not valid unless they fall within a class as to which jurisdiction has been conferred by statute.<sup>62</sup> In such cases a civil court will make an independent investigation of the factual basis of jurisdiction over the person<sup>63</sup>

<sup>58</sup> *United States ex rel. Pasela v. Fenno*, 167 F. 2d 593 (2d Cir. 1948), *cert. dismissed*, 335 U.S. 806 (1948) (offense committed while not on active duty).

<sup>59</sup> *Kahn v. Anderson*, 255 U.S. 1 (1921); *In re Craig*, 70 Fed. 969 (C.C., D. Kans. 1895); *Mosher v. Hudspeth*, 123 F. 2d 401 (10th Cir. 1941), *cert. denied*, 316 U.S. 670 (1942), *rehearing denied*, 316 U.S. 711 (1942); *Mosher v. Hunter*, 143 F. 2d 745 (10th Cir. 1944), *cert. denied*, 323 U.S. 800 (1945), *rehearing denied*, 324 U.S. 888 (1945), 326 U.S. 806 (1945). See *Carter v. McClaughry*, 183 U.S. 365 (1902).

<sup>60</sup> *In re Bogart*, Fed. Cas. No. 1,596 (C.C. D. Cal. 1873); *Ex parte Joly*, 290 Fed. 858 (S.D. N.Y. 1922); *Terry v. United States*, 2 F. Supp. 962 (W.D. Wash. 1933); *United States ex rel. Marino v. Hildreth*, 61 F. Supp. 667 (E.D. N.Y. 1945). *Contra: United States ex rel. Flannery v. Commanding General, Second Service Command*, 69 F. Supp. 661 (S.D. N.Y. 1946) (Holding A.W. 94, §1, ch. II, Act June 4, 1920, 41 Stat. 805, 10 U.S.C. §1566, unconstitutional in this respect). Cf. *Ex parte Henderson*, Fed. Cas. No. 6,349 (C.C., D. Ky. 1878); *United States v. Kelly*, 15 Wall. 34 (U.S. 1872); *United States v. Landers*, 92 U.S. 77 (1875).

<sup>61</sup> *Ex parte Gerlach*, 247 Fed. 616 (S.D. N.Y. 1917) (discharged mate of Army transport returning as a passenger on another Army transport); *Ex parte Falls*, 251 Fed. 415 (D. N.J. 1918) (cook on Army supply ship); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex. 1919) (quartermaster superintendent with troops in the field); *Hines v. Mikell*, 259 Fed. 28 (4th Cir. 1919), *cert. denied sub. nom. Mikell v. Hines*, 250 U.S. 645 (1919) (auditor in office of constructing quartermaster of training camp); *In re Di Bartolo*, 50 F. Supp. 929 (S.D. N.Y. 1943) (discharged employee of civilian firm under contract with the Army to service British planes in enemy territory conquered and occupied by British forces); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943) (cook on Army transport about to sail); *In re Berue*, 54 F. Supp. 252 (S.D. Ohio 1944) (seaman on vessel with Army cargo); *Perlstein v. United States*, 151 F. 2d 167 (3d Cir. 1945), *cert. dismissed sub. nom. Perlstein v. Hiatt*, 328 U.S. 822 (1946) (facts similar to *In re Di Bartolo*, *supra*); *Grewe v. France*, 75 F. Supp. 433 (E.D. Wis. 1948) (discharged Army employee in occupied enemy territory).

<sup>62</sup> *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash. 1943) (seaman on vessel carrying Navy cargo tried by military commission).

including, where pertinent, the question of whether the troops were "in the field."<sup>64</sup>

The question of the jurisdiction over persons exercisable by non-statutory military tribunals appointed to carry out military government of occupied enemy or rebel territory, to execute martial rule of domestic territory disturbed by war or insurrection, or to enforce the laws of war, has rarely been involved in litigation in the civil courts. It has been decided that a military commission sitting in domestic territory which is not in a zone of military operations and where the civil courts are functioning normally has no jurisdiction over a civilian citizen charged with aiding the enemy by discouraging the war effort<sup>65</sup> but that such a tribunal does have jurisdiction of a member of the enemy forces charged with violation of the laws of war even though he is a citizen of the United States.<sup>66</sup>

#### JURISDICTION OVER THE SUBJECT MATTER

In determining whether a tribunal had jurisdiction over the subject matter the possible topics of investigation include the sufficiency of the preliminary proceedings, whether the pleadings state an offense, whether that offense is within the jurisdiction of the tribunal, and whether facts peculiar to the particular case bar trial for the offense.

It will be recalled that the Fifth Amendment prohibits prosecution in the civil courts for a capital or otherwise infamous crime without an indictment or presentment of a grand jury. If there is no indictment or presentment a sentence is subject to collateral attack<sup>67</sup> but mere irregularities in the composition or procedure of the grand jury<sup>68</sup> or the conduct of the preliminary investigation are not jurisdictional.<sup>69</sup> The indictment or presentment is the basic

<sup>63</sup> Note 61, *supra*; *Ex parte* Henderson, Fed. Cas. No. 6,349 (C.C. D. Ky. 1878) (former military supply contractor); *Ex parte* Weitz, 256 Fed. 58 (D. Mass. 1919) (driver employed by contractor erecting training camp). Cf. Holmes v. Sheridan, Fed. Cas. No. 6,644 (C.C. D. Kans. 1870); Walker v. Chief Quarantine Officer, 69 F. Supp. 980 (Canal Z. 1943).

<sup>64</sup> Hines v. Mikell, note 61, *supra*.

<sup>65</sup> *Ex parte* Milligan, 4 Wall. 2 (U.S. 1866). See Duncan v. Kahanamoku, 327 U.S. 304 (1946); *In re* Egan, Fed. Cas. No. 4,303 (C.C. N.D. N.Y. 1866).

<sup>66</sup> United States *ex rel.* Quirin v. Cox, 317 U.S. 1 (1942). See *Ex parte* Mudd, Fed. Cas. No. 9,899 (S.D. Fla. 1868); *In re* Yamashita, 327 U.S. 1 (1946).

<sup>67</sup> *Ex parte* Wilson, 114 U.S. 417 (1885).

<sup>68</sup> *Ex parte* Harding, 120 U.S. 782 (1887); Matter of Moran, 203 U.S. 96 (1906); Kaizo v. Henry, 211 U.S. 146 (1908); United States *ex rel.* Potts v. Rabb, 141 F. 2d 45 (3d Cir. 1944), *cert. denied*, 322 U.S. 727 (1944); United States *ex rel.* McCann v. Thompson, 144 F. 2d 604 (2d Cir. 1944), *cert. denied*, 323 U.S. 790 (1944).

<sup>69</sup> Price v. Johnston, 144 F. 2d 260 (9th Cir. 1944), *cert. denied*, 323 U.S.

pleading which invokes the jurisdiction of the trial court. In the military and naval practice the basic pleading consists of sworn charges. Since 1920 it has been provided by statute that no charge will be referred to a general court-martial of the Army or Air Force for trial until after a thorough and impartial investigation thereof shall have been made.<sup>70</sup> Although several inferior federal courts had held or suggested that the absence or improper conduct of such an investigation was a ground for collateral attack on the judgment of a court-martial,<sup>71</sup> the Supreme Court has determined that the pre-trial investigation is not jurisdictional<sup>72</sup> and it is submitted that this determination is sound, both as a matter of law and as a matter of policy, considering the practical difficulties encountered by military commanders under field and combat conditions.

If a statute requires that the accused be served with a copy of the charges against him at the time of his arrest the sentence is probably subject to collateral attack if he is not served with charges at all<sup>73</sup> but not if service is merely delayed until some time after

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789 (1944), *rehearing denied* 323 U.S. 819 (1945); *Young v. Sanford*, 147 F. 2d 1007 (5th Cir. 1945), *cert. denied*, 325 U.S. 886 (1945); *Burall v. Johnston*, 146 F. 2d 230 (9th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

<sup>70</sup> A.W. 70, §1, Ch. II, Act June 4, 1920, 41 STAT. 802, 10 U.S.C. §1542; A.W. 46(b), §222, Title II, Act June 24, 1948, 62 STAT. 633, 10 U.S.C.A. §1517.

<sup>71</sup> *Romero v. Squier*, 133 F. 2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943); *Reilly v. Pescor*, 156 F. 2d 632 (8th Cir. 1946), *cert. denied*, 329 U.S. 790 (1946); *Hironimum v. Durant*, 168 F. 2d 288 (4th Cir. 1948), *cert. denied*, 335 U.S. 818 (1948); *Benjami vn. Hunter*, 169 F. 2d 512 (10th Cir. 1948); *Brown v. Sanford*, 170 F. 2d 344 (5th Cir. 1948); *De War v. Hunter*, 170 F. 2d 993 (10th Cir., 1948, *cert. denied*, 69 S. Ct. 1048 (1949), *rehearing denied*, 69 S. Ct. 1493 (1949); *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946); *Anthony v. Hunter*, 71 F. Supp. 823 (D. Kans. 1947) (the only case in which a prisoner was actually released from custody on this ground); *Flackman v. Hunter*, 75 F. Supp. 871 (D. Kans. 1948); *Richardson v. Zuppan*, 81 F. Supp. 809 (M.D. Pa. 1949); *Durant v. Hiatt*, 81 F. Supp. 948 (N.D. Ga. 1948). *Cf. Jackson v. Gough*, 170 F. 2d 630 (5th Cir. 1948), *cert. denied sub. nom. Jackson v. United States*, 336 U.S. 938 (1949); *Henry v. Hodges*, 171 F. 2d 401 (2d Cir. 1948), *cert. denied*, 69 S. Ct. 937 (1949), *rehearing denied sub. nom. Henry v. Smith*, 69 S. Ct. 1167 (1949); *Becker v. Webster*, 171 F. 2d 762 (2d Cir. 1949); *Glenn v. Hodges*, 79 F. Supp. 400 (S.D. N.Y. 1948); *Ex parte Steele*, 79 F. Supp. 428 (M.D. Pa. 1948). This view is favored in Schwartz, *Habeas Corpus and Court-Martial Deviations from the Articles of War*, 14 Mo. L. Rev. 147, 152-158 (1949).

<sup>72</sup> *Humphrey v. Smith*, 336 U.S. 695 (1949), *rehearing denied*, 69 S. Ct. 1492 (1949). *Accord: United States ex rel. Young v. Lehman*, 265 Fed. 852 (D. Mo. 1920) (investigation by draft board prior to trial for draft desertion); *Arnold v. Cozart*, 75 F. Supp. 47 (N.D. Tex. 1948); *Adams v. Hiatt*, 79 F. Supp. 433 (M.D. Pa. 1948).

<sup>73</sup> *See Smith v. United States*, 36 Ct. Cl. 304 (1901), *rev'd*, *United States v. Smith*, 197 U.S. 386 (1905). That the charges were not under oath is not jurisdictional. *McClellan v. Humphrey*, 83 F. Supp. 510 (M.D. Pa. 1949).

the original arrest.<sup>74</sup> Under the military practice charges are referred for trial to a court-martial by the commander who appoints the court-martial or his successor in command. Military lawyers consider that the lack of or defects in an order of reference for trial are not jurisdictional because the commander's approval of the sentence ratifies the court-martial's assumption of jurisdiction.<sup>75</sup> The civil courts appear to agree with this view.<sup>76</sup>

Military charges consist of the charge proper, which is a general statement of the offense, such as "murder, in violation of the 92nd article of war" or merely "violation of the 92nd article of war," and the specification, a detailed statement of the facts constituting the offense. It is well settled that military charges need not be framed with the technical precision of a common law indictment, it being sufficient if they inform the accused of the general nature of the offense with which he is charged and the time, place and circumstances under which it was committed.<sup>77</sup> If the offense charged is a common law crime or a crime defined by statute the civil court will examine the specification to determine whether the facts alleged constitute the crime charged.<sup>78</sup> A like examination will be made in the case of a charge of violation of the laws of war.<sup>79</sup> On the contrary, if the charge is a violation of customary military law or the customs of the sea (normally laid in military pleading as conduct prejudicial to good order and military discipline, conduct unbecoming an officer and a gentleman or scandalous conduct tending to the destruction of good morals), a civil court will not look beyond the charge; the determination of a

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<sup>74</sup> *Johnson v. Sayre*, 158 U.S. 109 (1894); *United States v. Smith*, 197 U.S. 386 (1905); *In re Crain*, 84 Fed. 788 (C.C. D. Mass. 1897). *Cf. Rogers v. United States*, 270 U.S. 154 (1926).

<sup>75</sup> CM ETO 393 (1943), 3 BULL. J.A.G. 54 (1944).

<sup>76</sup> *Flackman v. Hunter*, 75 F. Supp. 871 (D. Kans. 1948). *Cf. United States ex rel. Hartley v. Malanaphy*, 81 F. Supp. 316 (E.D. N.Y. 1948).

<sup>77</sup> *Collins v. McDonald*, 258 U.S. 416 (1922); *In re Yamashita*, 327 U.S. 1, 17 (1946); *United States v. Maney*, 61 Fed. 140 (C.C. D. Minn. 1894); *Johnson v. Biddle*, 12 F. 2d 366 (8th Cir., 1926); *Bigrow v. Hiatt*, 70 F. Supp. 826, 74 F. Supp. 240 (M.D. Pa. 1947), *aff'd*, 168 F. 2d 992 (3d Cir. 1948); *Randle v. Sanford*, 79 F. Supp. 585 (N.D. Ga. 1946).

<sup>78</sup> *Collins v. McDonald*, note 77, *supra*; *Anderson v. Crawford*, 265 Fed. 504 (8th Cir. 1920); *Johnson v. Biddle*, note 77, *supra*; *Ex parte Drainer*, 65 F. Supp. 410 (N.D. Cal. 1946), *aff'd*, *Gould v. Drainer*, 158 F. 2d 981 (9th Cir. 1947); *Bigrow v. Hiatt*, note 77, *supra*; *Randle v. Sanford*, note 77, *supra*.

<sup>79</sup> *United States ex rel. Wessels v. McDonald*, 265 Fed. 754 (E.D. N.Y. 1920), *cert. dism. sub. nom. Wessels v. McDonald*, 256 U. S. 705 (1921); *United States ex rel. Quirin v. Cox*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946) (the Court examined the bill of particulars as well as the charges and specifications). *Cf. Mechanic's and Trader's Bank v. Union Bank*, 22 Wall. 276 (U.S. 1874).

court-martial as to the sufficiency of a specification laid under such a charge is not reviewable by the civil courts.<sup>80</sup>

A military tribunal may try the accused for several offenses at the same time<sup>81</sup> and no mere defect of pleading is jurisdictional. For example, a civil court will not inquire whether the charge or specification is laid under the wrong statute or contains allegations which are surplusage,<sup>82</sup> whether two or more offenses are alleged of several charges.<sup>84</sup> It may inquire, however, whether the offense of which the accused was found guilty is the same as, or included in, the one with which he was charged.<sup>85</sup> If the charges state no offense or state only offenses over which the military tribunal has no jurisdiction its sentence will be held void on collateral attack<sup>86</sup>

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<sup>80</sup> *Dynes v. Hoover*, 20 How. 65 (U.S. 1857); *Smith v. Whitney*, 116 U.S. 167 (1886); *Swaim v. United States*, 165 U.S. 553 (1897); *Carter v. McClaughry*, 183 U.S. 365 (1902); *In re Corbett*, Fed. Cas. No. 3,219 (E.D. N.Y. 1877); *United States v. Maney*, 61 Fed. 140 (C.C. D. Minn. 1894); *Rose ex rel. Carter v. Roberts*, 99 Fed. 948 (2d Cir. 1900), *cert. denied sub. nom. Carter v. Roberts*, 176 U.S. 684 (1900); *Ex parte Dickey*, 204 Fed. 322 (D. Me. 1913); *McRae v. Henkes*, 273 Fed. 108 (8th Cir. 1921), *cert. denied sub. nom. Henkes v. McRae*, 258 U.S. 624 (1922). *Cf. United States v. Fletcher*, 148 U.S. 84 (1893); *Sanford v. Callan*, 148 F. 2d 376 (5th Cir. 1945), *cert. dismissed sub. nom. Callan v. Sanford*, 326 U.S. 679 (1945). This rule is the same as that applied in a collateral attack on a judgment of a federal district court: whether the offense is one of the general class over which the court has jurisdiction may be questioned but the court's decision that the facts alleged in the indictment constitute that offense is not subject to review. *Ex parte Watkins*, 3 Pet. 193 (U.S. 1830); *Ex parte Parks*, 93 U.S. 18 (1876); *In re Coy*, 127 U.S. 731 (1888). See Stein, *Judicial Review of Determinations of Federal Military Tribunals*, 11 BROOKLYN L. REV. 30, 41 (1941).

<sup>81</sup> *Carter v. McClaughry*, 183 U.S. 365 (1902); *Ex parte Campo*, 71 F. Supp. 543 (S.D. N.Y. 1947), *aff'd*, *United States ex rel. Campo v. Swenson*, 165 F. 2d 213 (2d Cir. 1947).

<sup>82</sup> *Ex parte Mason*, 105 U.S. 696 (1882); *Johnson v. Biddle*, 12 F. 2d 366 (8th Cir. 1926).

in a single specification<sup>83</sup> or whether the same act is made the basis

<sup>83</sup> *Bigrow v. Hiatt*, 70 F. Supp. 826, 74 F. Supp. 240 (M.D. Pa. 1947), *aff'd*, 168 F. 2d 992 (3d Cir. 1948).

<sup>84</sup> *Rose ex rel. Carter v. Roberts*, 99 Fed. 948 (2d Cir. 1900), *cert. denied sub. nom. Carter v. Roberts*, 176 U.S. 684 (1900); *Carter v. McClaughry*, 183 U.S. 365 (1902); *McRae v. Henkes*, 273 Fed. 108 (8th Cir. 1921), *cert. denied sub. nom. Henkes v. McRae*, 258 U.S. 624 (1922). *Accord* (civil court): *Crapo v. Johnston*, 144 F. 2d 863 (9th Cir. 1944), *cert. denied*, 323 U.S. 785 (1944), *rehearing denied*, 323 U.S. 818 (1945), 324 U.S. 886 (1945).

<sup>85</sup> *Dynes v. Hoover*, 20 How. 65 (U.S. 1857) (holding that attempting to desert is included within desertion); *Bankhead v. United States*, 20 Ct. Cl. 405 (1885) (holding that specific acts of drunkenness are included within habitual drunkenness).

<sup>86</sup> *United States v. MacKenzie*, Fed. Cas. No. 18,313 (S.D. N.Y. 1843); *Vance v. United States*, 30 Ct. Cl. 252 (1895); *United States ex rel. Davis v. Waller*, 225 Fed. 673 (E.D. Pa. 1915); *Anderson v. Crawford*, 265 Fed. 504 (8th Cir. 1920); *Rosborough v. Rossell*, 150 F. 2d 809 (1st Cir. 1945);



but if any offense within the jurisdiction of the tribunal is stated, its lack of jurisdiction over other charges does not affect the validity of the sentence<sup>87</sup> unless, of course, its sentence would be illegal if imposed solely for the offense over which it has jurisdiction.<sup>88</sup>

If a statute provides that no person shall be tried by court-martial for murder committed within the continental United States in time of peace the test is not whether conditions were, as a matter of fact, peaceable in the area or whether hostilities have ceased but whether the United States as a whole is completely at peace pursuant to ratification of a treaty of peace.<sup>89</sup> A statute requiring the military authorities to deliver a soldier charged with a civil crime, upon application, to the civil authorities for trial, except in time of war, does not entitle the soldier to object to trial by court-martial for a civil crime in time of peace<sup>90</sup> or to trial by a civil court for such a crime in time of war.<sup>91</sup>

The rulings of military tribunals on defensive pleas in confession and avoidance, such as the statute of limitations<sup>92</sup> and entrapment<sup>93</sup> are not subject to review by the civil courts. The weight of authority in the inferior federal courts applies the same rule to rulings on pleas of double jeopardy.<sup>94</sup> The Supreme Court has

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*Ex parte Drainer*, 65 F. Supp. 410 (N.D. Cal. 1946), *aff'd*, *Gould v. Drainer*, 158 F. 2d 981 (9th Cir. 1947); *Ex parte Mulvaney*, 82 F. Supp. 743 (D. Hawaii 1949); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943). *Cf. Houston v. Moore*, 5 Wheat. 1 (U.S. 1820) (Court considered constitutionality of statute conferring jurisdiction); *Johnsen v. United States*, 41 F. 2d 44 (9th Cir. 1930), *cert. denied*, 282 U.S. 864 (1930); *Melvin v. United States*, 45 Ct. Cl. 213 (1910) ("hazing" sufficiently definite in statute conferring jurisdiction).

<sup>87</sup> *Crouch v. United States*, 13 F. 2d 348 (9th Cir. 1926); *Reilly c. Pescor*, 156 F. 2d 632 (8th Cir. 1946), *cert. denied*, 329 U.S. 790 (1946); *Harris v. Sanford*, 78 F. Supp. 963 (N.D. Ga. 1947).

<sup>88</sup> Discussed *infra*.

<sup>89</sup> *Kahn v. Anderson*, 255 U.S. 1 (1921); *Givens v. Zerbst*, 255 U.S. 11 (1921). *Cf. Ex parte Ortiz*, 100 Fed. 955 (C.C. D. Minn. 1900). For a different test applied to determine the propriety of martial rule, see note 31, *supra*.

<sup>90</sup> *Ex parte Mason*, 105 U.S. 696 (1882).

<sup>91</sup> *Kennedy v. Sanford*, 166 F. 2d 568 (5th Cir. 1948), *cert. denied*, 333 U.S. 864 (1948); *Canella v. United States*, 157 F. 2d 470 (9th Cir. 1946); *United States v. Canella*, 63 F. Supp. 377 (S.D. Cal. 1945) (thorough discussion of the problem).

<sup>92</sup> *In re Bogart*, Fed. Cas. No. 1,596 (C.C. D. Cal. 1873); *In re White*, 17 Fed. 723 (C.C. D. Cal. 1883); *In re Davison*, 21 Fed. 618 (C.C. S.D. N.Y. 1884); *In re Zimmerman*, 30 Fed. 176 (C.C. N.D. Cal. 1887); *In re Cadwallader*, 127 Fed. 881 (C.C. D. Mo. 1904); *Ex parte Townsend*, 133 Fed. 74 (D. Neb. 1904).

<sup>93</sup> *Romer vo. Squier*, 133 F. 2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943).

<sup>94</sup> *In re Bogart*, Fed. Cas. No. 1,596 (C.C. D. Cal. 1873); *In re Esmond*, 5 Mackey 64 (D.C. 1886); *United States v. Maney*, 61 Fed. 40 (C.C. D. Minn. 1894); *Rose ex rel. Carter v. Roberts*, 99 Fed. 948 (2d Cir. 1900), *cert. denied*

considered this question on three occasions but has not decided it because in each case it approved of the court-martial's ruling.<sup>95</sup> When court-martial jurisdiction is dependent upon continued active military status a court-martial has no jurisdiction over an offense committed in a prior enlistment or tour of active duty. The claim of discharge or release from active duty is, therefore, not merely defensive and a court-martial's ruling on it may be challenged on collateral attack.<sup>96</sup>

#### LAWFULNESS OF THE SENTENCE

Incident to a collateral attack on a sentence of a court-martial a civil court may examine the record of the tribunal to determine whether it reached its findings and sentence by the majority required by statute.<sup>97</sup> That the court-martial announced in pronouncing sentence that a recommendation for clemency would be made and all of the members later joined in a recommendation for substantial reduction of the sentence does not affect the validity of the sentence actually imposed.<sup>98</sup> The fact that only two-thirds of the members voted for findings of guilt does not affect the validity of a sentence requiring a three-fourths vote if three-

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*sub. nom.* Carter v. Roberts, 176 U.S. 684 (1900); Sanford v. Robbins, 115 F. 2d 435 (5th Cir. 1940), *cert. denied sub. nom.* Robbins v. Sanford, 312 U.S. 697 (1940). *Cf. In re Stubbs*, 133 Fed. 1012 (C.C. D. Wash. 1905); *Ex parte Costello*, 8 F. 2d 386 (E.D. Va. 1925); *Wrublewski v. McInerney*, 166 F. 2d 243 (9th Cir. 1948). The question of double jeopardy may not be considered in a collateral attack on a judgment of a federal district court. *Crapo v. Johnston*, 144 F. 2d 863 (9th Cir. 1944), *cert. denied*, 323 U.S. 785 (1944), *rehearing denied*, 323 U.S. 818 (1945), 324 U.S. 886 (1945).

<sup>95</sup> Carter v. McClaghry, 183 U.S. 365 (1902); Bishop v. United States, 197 U.S. 334 (1905); Wade v. Hunter, 69 S. Ct. 834 (1949) (case withdrawn from one court-martial and referred to another after the evidence and arguments of counsel had been heard and the court had granted a continuance to secure additional witnesses). See Crane, *Double Jeopardy and Courts-Martial*, 3 MINN. L. REV. 181, 187 (1919).

<sup>96</sup> United States *ex rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949) (after committing offense accused was discharged from the Navy and reenlisted the following day); United States *ex rel.* Viscardi v. MacDonald, 265 Fed. 695 (E.D. N.Y. 1920) (naval reservist relieved from active duty after committing offense but recalled to active duty before trial). *Cf. notes* 58, 60, *supra*.

<sup>97</sup> Stout v. Hancock, 146 F. 2d 741 (4th Cir. 1944), *cert. denied sub. nom.* Hancock v. Stout, 325 U.S. 850 (1945); Hurse v. Caffey, 59 F. Supp. 363 (N.D. Tex. 1945); *Ex parte Beshorse*, 63 F. Supp. 997 (D. Mont. 1945), *appeal dism. sub. nom.* Beshorse v. Weyland, 155 F. 2d 723 (9th Cir. 1946); *Ex parte Campo*, 71 F. Supp. 543 (S.D. N.Y. 1947), *aff'd sub. nom.* United States *ex rel.* Campo v. Swenson, 165 F. 2d 213 (2d Cir. 1947); Thompson v. Sanford, 79 F. Supp. 584 (N.D. Ga. 1946); McDaniel v. Hiatt, 78 F. Supp. 573 (M.D. Pa. 1948); Brown v. Hunter, 172 F. 2d 487 (10th Cir. 1949).

<sup>98</sup> Brown v. Hunter, 172 F. 2d 487 (10th Cir. 1949). The reason for this procedure was that the statute, since amended in this respect, required a sentence of death or life imprisonment upon conviction of rape.

fourths voted for the sentence.<sup>99</sup> In the absence of statutory prohibition the reviewing authority (officer who appointed the court-martial) may return the record of trial for reconsideration of the sentence and an increased sentence imposed upon such reconsideration is valid.<sup>100</sup>

If a statute provides that the record of a court-martial trial shall be examined prior to confirmation by a board of review consisting of not less than three officers, a civil court may inquire whether such examination was made but the fact that one member of the board of review was absent is not fatal<sup>101</sup> and neither is the fact that exhibits were withdrawn from the record before it reached the board of review.<sup>102</sup> If a statute requires that the sentence be confirmed by the President or some other superior official such confirmation is a judicial act which requires the exercise of personal discretion.<sup>103</sup> However, the sign manual of the President is not required and a civil court will not go behind a certificate of the secretary of the department that the President did act.<sup>104</sup> A statute requiring approval of the sentence by the "commanding officer" is satisfied by approval by the President.<sup>105</sup> Promulgation of the sentence in orders is not jurisdictional, so the fact that the accused was discharged from the service prior to promulgation does not affect the validity of the sentence.<sup>106</sup> The President or the secretary of the department acting for him may, as an incident of the pardoning power, commute a sentence, that is, change its nature, as from death to life imprisonment.<sup>107</sup> The President may approve the entire sentence although he disapproves some of the

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<sup>99</sup> *Ex parte Campo*, note 97, *supra*. Petitioner contended that the statutory requirement of a three-fourths vote on the sentence coerced the consciences of the members who voted not guilty in violation of the First Amendment.

<sup>100</sup> *Ex parte Reed*, 100 U.S. 13 (1879); *Swaim v. United States*, 165 U.S. 553 (1897); *See Fratcher, op. cit.*, note 4, *supra*, 34-35, 45.

<sup>101</sup> *Flackman v. Hunter*, 75 F. Supp. 871 (D. Kans. 1948).

<sup>102</sup> *Romero v. Squier*, 133 F. 2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943). *Cf. Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946) [saying (the case was moot) that appellate review was inadequate because the board failed to find that the court-martial's errors were prejudicial]. *Cf. Ex parte Mason*, 256 Fed. 384 (N.D. N.Y. 1882).

<sup>103</sup> *Runkle v. United States*, 122 U.S. 543 (1887). *Accord: McLean v. United States*, 73 F. Supp. 775 (W.D. S.C. 1947). *Cf. Bishop v. United States*, 197 U.S. 334 (1905); *United States ex rel. French v. Weeks*, 259 U.S. 326 (1922); *Melvin v. United States*, 45 Ct. Cl. 213 (1910).

<sup>104</sup> *United States v. Page*, 137 U.S. 673 (1891); *United States v. Fletcher*, 148 U.S. 84 (1893); *Ide v. United States*, 150 U.S. 517 (1893).

<sup>105</sup> *Martin v. Mott*, 12 Wheat. 19 (U.S. 1827).

<sup>106</sup> *Lyon v. United States*, 48 Ct. Cl. 5 (1912).

<sup>107</sup> *Ex parte Wells*, 18 How. 307 (U.S. 1855) (sentence of civil court); *Mullan v. United States*, 212 U.S. 561 (1909) (naval court-martial); *Aderhold v. Menefee*, 67 F. 2d 345 (5th Cir. 1933) (naval court-martial; commutation by Secretary of the Navy).

findings of guilty.<sup>108</sup>

A court-martial sentence is subject to collateral attack if its imposition for the offenses of which the court-martial had jurisdiction and found the accused guilty is prohibited by statute or executive regulations.<sup>109</sup> If the offenses of which the court-martial did have jurisdiction warrant the sentence, however, the fact that it lacked jurisdiction of some of the offenses will not affect the validity of the sentence.<sup>110</sup> It would seem that a sentence which is proper as to type of punishment but excessively long is void only as to the excess.<sup>111</sup> The civil courts recognize the rule of military law, which differs from the common law rule, that sentences presumptively run consecutively not concurrently.<sup>112</sup> A civil court has, of course, no concern with the severity of a court-martial sentence so long as it was within the power of the court-martial to impose.<sup>113</sup>

The court-martial may and, in the modern practice, commonly does leave designation of the place of confinement to the reviewing or confirming authority.<sup>114</sup> If confinement in a penitentiary is authorized by law for the offense involved a penitentiary may be designated<sup>115</sup> and in such cases military prisoners are governed by the same rules as those sentenced by the civil courts, notwithstanding the fact that they would have more liberal parole privileges if confined in a disciplinary barracks.<sup>116</sup> If a statute pro-

<sup>108</sup> *Carter v. McClaughry*, 183 U.S. 365 (1902).

<sup>109</sup> *Dynes v. Hoover*, 20 How. 65 (U.S. 1857) *Rose ex rel. Carter v. Roberts*, 99 Fed. 948 (2d Cir. 1900), *cert. denied sub. nom. Carter v. Roberts*, 176 U.S. 684 (1900); *Carter v. Roberts*, 177 U.S. 496 (1900); *Carter v. McClaughry*, 183 U.S. 365 (1902); *In re Langan*, 123 Fed. 132 (C.C. E.D. Mo. 1903); *Colman v. United States*, 38 Ct. Cl. 315 (1903); *Tullidge v. Biddle*, 4 F. 2d 897 (8th Cir. 1925); *Sanford v. Callan*, 148 F. 2d 376 (5th Cir. 1945), *cert. dismiss. sub. nom. Callan v. Sanford*, 326 U.S. 679 (1945). *Contra: In re Biddle*, Fed. Cas. No. 18, 236 (C.C. D.C. 1855). *Cf. Williams v. United States*, 24 Ct. Cl. 306 (1889) (whether sentence sufficiently definite for enforcement).

<sup>110</sup> *Crouch v. United States*, 13 F. 2d 348 (9th Cir. 1926); *Harris v. Sanford*, 78 F. Supp. 963 (N.D. Ga. 1947); *McClellan v. Humphrey*, 83 F. Supp. 510 (M.D. Pa. 1949).

<sup>111</sup> *United States v. Pridgeon*, 153 U.S. 48 (1894); *McKee v. Johnston*, 109 F. 2d 273 (9th Cir. 1939), *cert. denied*, 309 U.S. 664 (1940). These cases involve sentences of federal district courts.

<sup>112</sup> *Kirkman v. McClaughry*, 160 Fed. 436 (8th Cir. 1907).

<sup>113</sup> *Dynes v. Hoover*, 20 How. 65 (U.S. 1857). *Cf. Burns ex rel. Burns v. Sanford*, 77 F. Supp. 464 (N.D. Ga. 1948).

<sup>114</sup> *Givens v. Zerbst*, 255 U.S. 11 (1921); *In re Brodie*, 128 Fed. 665 (8th Cir. 1904).

<sup>115</sup> *Ex parte Mason*, 105 U.S. 696 (1882); *McGlensy v. Van Vranken*, 163 U.S. 694 (1895), *reversing Ex parte Van Vranken*, 47 Fed. 888 (C.C. E.D. Va. 1891); *Givens v. Zerbst*, note 114, *supra*; *In re Brodie*, note 114, *supra*; *Yates v. Hunter*, 174 F. 2d 347 (10th Cir. 1949).

<sup>116</sup> *Fitch v. Hiatt*, 48 F. Supp. 388 (M.D. Pa. 1942); *Johnson v. Hiatt*, 71 F. Supp. 865 (M.D. Pa. 1947); *aff'd*, 163 F. 2d 1018 (3d Cir. 1947), *cert. denied*, 333 U.S. 829 (1948).

hibits confinement in a penitentiary unless an act or omission of which the accused is convicted is a civil crime punishable by penitentiary confinement by the civil courts, the fact that the offense is charged as a military offense (i.e., conduct prejudicial to good order and military discipline) will not prevent designation of a penitentiary so long as an act involved in the offense is a civil crime.<sup>117</sup>

If an unauthorized institution is designated as the place of confinement the designation is subject to collateral attack<sup>118</sup> but the civil court will not order the prisoner's release; it will merely give the military authorities an opportunity to designate a proper place of confinement.<sup>119</sup> In the absence of statutory prohibition, although a disciplinary barracks was originally designated as the place of confinement, the prisoner may later be transferred to a reformatory<sup>120</sup> or a penitentiary.<sup>121</sup> But a statute providing that persons sentenced to "confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary," prevents transfer to a penitentiary.<sup>122</sup> The fact that a person under sentence of court-martial is discharged or dismissed from the service does not prevent execution of the unexecuted portion of the sentence.<sup>123</sup>

#### REGULARITY OF TRIAL PROCEDURE

A civil court may examine the evidence received by an administrative tribunal to determine whether its findings are supported by substantial evidence.<sup>124</sup> A civil court may not inquire into the evidence or lack of evidence received by a military tribunal and has no concern whatever with the weight or credibility of the evidence or its sufficiency to support the findings, these questions be-

<sup>117</sup> *Ex parte* Mason, note 115, *supra*.

<sup>118</sup> *Ex parte* Hewitt, Fed. Cas. No. 6,442 (S.D. Miss. 1869).

<sup>119</sup> *Givens v. Zerbst*, 255 U.S. 11 (1921); *Kelly v. Hunter*, 80 F. Supp. 851 (D. Kans. 1948). *Accord: In re Bonner*, 151 U.S. 242 (1894) (sentence of federal district court).

<sup>120</sup> *Green v. Schilder*, 162 F. 2d 803 (10th Cir. 1947), *cert. denied*, 332 U.S. 838 (1947).

<sup>121</sup> *Kelly v. Hunter*, 80 F. Supp. 851 (D. Kans. 1948). *Cf. O'Malley v. Hiatt*, 74 F. Supp. 44 (M.D. Pa. 1947).

<sup>122</sup> *Kelly v. Hunter*, note 121, *supra*.

<sup>123</sup> *Carter v. McClaughry*, 183 U.S. 365 (1902); *O'Malley v. Hiatt*, 74 F. Supp. 44 (M.D. Pa. 1947); *Steele v. Humphrey*, 80 F. Supp. 544 (M.D. Pa. 1948).

<sup>124</sup> §10, Administrative Procedure Act, June 11, 1946, 60 STAT. 243, 5 U.S.C. §1009. *Cf. Zakonaite v. Wolf*, 226 U.S. 272 (1912); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103 (1927).

ing wholly for the military reviewing authorities.<sup>125</sup> A civil court may not review a military tribunal's rulings on the admission or exclusion of evidence,<sup>126</sup> even when it is alleged that the tribunal's findings are based upon perjured evidence,<sup>127</sup> a coerced confession,<sup>128</sup> or evidence procured by means of an unlawful search and seizure in violation of the Fourth Amendment to the Constitution.<sup>129</sup>

As has been seen, a military tribunal's erroneous rulings on questions within its jurisdiction, such as challenges, pleas, and the admissibility of evidence, are not reviewable on collateral attack. Some procedural requirements imposed by statute or executive regulation are, however, jurisdictional.<sup>130</sup> For example, if an executive regulation prohibits a court-martial from proceeding with a case after the issue of insanity is raised, its doing so may be beyond its jurisdiction.<sup>131</sup> Likewise, if a statute prohibits the trial judge

<sup>125</sup> *United States v. Fletcher*, 148 U.S. 84 (1893); *Swain v. United States*, 165 U.S. 553 (1897); *Carter v. McClaughry*, 183 U.S. 365 (1902); *Collins v. McDonald*, 258 U.S. 416 (1922); *In re Yamashita*, 327 U.S. 1 (1946); *Humphrey v. Smith*, 336 U.S. 695 (1949); *In re Corbett*, Fed. Cas. No. 3,219 (E.D. N.Y. 1877); *Rose ex rel. Carter v. Roberts*, 99 Fed. 948 (2d Cir. 1900); *cert. denied sub. nom. Carter v. Roberts*, 176 U.S. 684 (1900); *United States ex rel. Okenfus v. Schulz*, 67 F. Supp. 528 (S.D. N.Y. 1946); *Bigrow v. Hiatt*, 70 F. Supp. 826, 74 F. Supp. 240 (M.D. Pa. 1947), *aff'd*, 168 F. 2d 992 (3d Cir. 1948); *Krull v. Hiatt*, 74 F. Supp. 349 (M.D. Pa. 1947); *McDaniel v. Hiatt*, 78 F. Supp. 573 (M.D. Pa. 1948); *Lewis v. Sanford*, 79 F. Supp. 77 (N.D. Ga. 1948); *Adams v. Hiatt*, 79 F. Supp. 433 (M.D. Pa. 1948); *Ex parte Steele*, 79 F. Supp. 428 (M.D. Pa. 1948); *Montalvo v. Hiatt*, 174 F. 2d 645 (5th Cir. 1949); *Duval v. Humphrey*, 83 F. Supp. 457 (M.D. Pa. 1949); *McClellan v. Humphrey*, 83 F. Supp. 510 (M.D. Pa. 1949); *Hayes v. Hunter*, 83 F. Supp. 940 (D. Kans. 1948). *Contra*: *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946). *Cf. United States ex rel. Marino v. Hildreth*, 61 F. Supp. 667 (E.D. N.Y. 1945); *Boone v. Nelson*, 72 F. Supp. 807 (D. Me. 1947); *Burns ex rel. Burns v. Sanford*, 77 F. Supp. 464 (N.D. Ga. 1948).

<sup>126</sup> *Rogers v. United States*, 270 U.S. 154 (1926); *In re Yamashita*, 327 U.S. 1 (1946); *United States ex rel. Okenfus v. Schulz*, note 125, *supra*; *Adams v. Hiatt*, note 125, *supra*; *Ex parte Steele*, note 125, *supra*; *McClellan v. Humphrey*, note 125, *supra*. *Cf. Burns ex rel. Burns v. Sanford*, 77 F. Supp. 464 (N.D. Ga. 1948).

<sup>127</sup> *Carter v. Woodring*, 92 F. 2d 544 (D.C. Cir. 1937), *cert. denied*, 302 U.S. 752 (1937); *McDaniel v. Hiatt*, 78 F. Supp. 573 (M.D. Pa. 1948). *Contra*: *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946).

<sup>128</sup> *Collins v. McDonald*, 258 U.S. 416 (1922); *Burall v. Johnston*, 134 F. 2d 614 (9th Cir. 1943), *cert. denied*, 319 U.S. 768 (1943), *rehearing denied*, 320 U.S. 810, 812 (1943).

<sup>129</sup> *In re Meader*, 60 F. Supp. 80 (E.D. N.Y. 1945); *Richardson v. Zuppan*, 81 F. Supp. 809 (M.D. Pa. 1949). *Accord* (federal district court sentence): *Price v. Johnston*, 125 F. 2d 806 (9th Cir. 1942), *cert. denied*, 316 U.S. 677 (1942), *rehearing denied*, 316 U.S. 712 (1942). *Cf. Romero v. Squier*, 133 F. 2d 528 (9th Cir. 1943), *cert. denied*, 318 U.S. 785 (1943); *Grew v. France*, 75 F. Supp. 433 (E.D. Wis. 1948).

<sup>130</sup> *Dynes v. Hoover*, 20 How. 65 (U.S. 1857); *Runkle v. United States*, 122 U.S. 543 (1887). *Cf. Mullan v. United States*, 212 U.S. 516 (1909).

<sup>131</sup> *United States v. Hunt*, 254 Fed. 365 (S.D. N.Y. 1918).

advocate from attending closed sessions of the court-martial, his presence at such a session may oust jurisdiction.<sup>132</sup> If a statute requires the presence of the accused at the trial, a court-martial which proceeds in his absence is probably without jurisdiction.<sup>133</sup> No doubt proceeding in the absence of a statutory quorum, or in the absence of the law member when his presence is required by statute, would oust jurisdiction.<sup>134</sup> Except in such rare cases, in which the irregularity goes to the constitution of the tribunal or its jurisdiction over the person or the subject-matter, the failure of a military tribunal to follow statutory or executive regulations governing its procedure does not subject its judgment to collateral attack.<sup>135</sup>

Until recent years it was well settled that the denial by a civil court in a criminal case of rights guaranteed by the Fifth and Sixth Amendments to the Constitution did not subject its judgment to collateral attack.<sup>136</sup> By a series of fairly recent decisions the United States Supreme Court greatly expanded the functions of the writ of habeas corpus as a method of reviewing decisions of state and federal courts in criminal cases, extending the scope of inquiry to denials of rights under the Fifth, Sixth and Fourteenth Amendments which operated to deprive the defendant of a fair trial as conceived by the common law.<sup>137</sup> One of these decisions

<sup>132</sup> United States *ex rel.* Innes v. Crystal, 131 F. 2d 576 (2d Cir. 1943), *cert. denied*, 319 U.S. 755 (1943), *rehearing denied*, 319 U.S. 783 (1943). *Contra* (not jurisdictional): *Ex parte* Tucker, 212 Fed. 569 (D. Mass. 1913); United States *ex rel.* Innes v. Hiatt, 141 F. 2d 664 (3d Cir. 1944).

<sup>133</sup> See Weirman v. United States, 36 Ct. Cl. 236 (1901).

<sup>134</sup> A.W. 8, §206, Title II, Act June 24, 1948, 62 STAT. 628, 10 U.S.C.A. §10 provides "That no general court-martial shall receive evidence or vote upon its findings or sentence in the absence of the law member regularly detailed." *Cf.* Duval v. Humphrey, 83 F. Supp. 457 (M.D. Pa. 1949).

<sup>135</sup> Keyes v. United States, 109 U.S. 336 (1883) (that officer who signed the charges acted as a witness for the prosecution and also as a member of the court not jurisdictional); McMicking v. Schields, 238 U.S. 99 (1915) (that military tribunal refused compliance with an executive regulation requiring it to grant an accused two days in which to prepare his defense not jurisdictional).

<sup>136</sup> Matter of Moran, 203 U.S. 96 (1906); Goto v. Lane, 265 U.S. 393 (1924).

<sup>137</sup> *E.g.*, Moore v. Dempsey, 261 U.S. 86 (1922) (court under mob pressure); Powell v. Alabama, 287 U.S. 45 (1932) (denial of counsel); Mooney v. Holohan, 294 U.S. 103 (1935) (prosecution knowingly using perjured testimony and suppressing the truth); Johnson v. Zerbst, 304 U.S. 458 (1937); Walker v. Johnston, 312 U.S. 275 (1941) (coerced plea of guilty); Smith v. O'Grady, 312 U.S. 329 (1941) (plea of guilty secured by trick); Waley v. Johnston, 316 U.S. 101 (1942) (coerced plea of guilty); Cochran v. Kansas, 316 U.S. 255 (1942) (denial of right to appeal); Pyle v. Kansas, 317 U.S. 213 (1942) (prosecution securing perjured testimony by threats and intimidating defense witnesses); Williams v. Kaiser, 323 U.S. 471 (1945); Price v. Johnston, 334 U.S. 266 (1948) (prosecution knowingly using perjured testimony). See

suggested that the denial of the constitutional right involved (counsel) ousted the court's jurisdiction.<sup>138</sup> This is certainly not true in the usual use of the term "jurisdiction" and the Court itself recognized that fact in a later opinion by stating that relief would be granted by habeas corpus if the trial court lacked jurisdiction or if it denied constitutional rights.<sup>139</sup> It would seem, then, that this series of decisions does not change the traditional concept of jurisdiction; it merely expands the use of the writ of habeas corpus in the review of judgments of civil courts.

Several inferior federal courts have stated or acted on the assumption that this series of decisions effected a corresponding extension of the scope of inquiry incident to a collateral attack on a judgment of a military tribunal<sup>140</sup> and one such court has given relief from a court-martial sentence on the ground of denial of due process of law.<sup>141</sup> Several other inferior federal courts have denied

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Bowen v. Johnston, 306 U.S. 19, 23 (1939); *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657-675 (1948).

<sup>138</sup> Johnson v. Zerbst, note 137, *supra*, 468.

<sup>139</sup> Waley v. Johnston, note 137, *supra*, 104. See *United States ex rel. Innes v. Hiatt*, 141 F. 2d 664, 665-666 (3d Cir. 1944).

<sup>140</sup> *Schita v. King*, 133 F. 2d 283 (8th Cir. 1943) [denial of competent counsel; intimidation of witnesses; the same court later decided that denial of due process had not been established, *Schita v. Cox*, 139 F. 2d 971 (8th Cir. 1944), *cert. denied sub. nom. Schita v. Pescor*, 322 U.S. 761 (1944), *rehearing denied*, 323 U.S. 810 (1944); *United States ex rel. Innes v. Hiatt*, 141 F. 2d 664 (3d Cir. 1944) (trial judge advocate present in closed session; this is the most carefully considered opinion adopting this view); *Altmayer v. Sanford*, 148 F. 2d 161 (5th Cir. 1945) (denial of counsel); *Hironimus v. Durant*, 168 F. 2d 288 (4th Cir. 1948), *cert. denied sub. nom. Durant v. Hironimus*, 335 U.S. 818 (1948); *Jackson v. Gough*, 170 F. 2d 630 (5th Cir. 1948), *cert. denied sub. nom. Jackson v. United States*, 336 U.S. 938 (1949) (Negroes systematically excluded from court); *Benjamin v. Hunter*, 169 F. 2d 512 (10th Cir. 1948) (pre-trial investigation not impartial); *Brown v. Sanford*, 170 F. 2d 344 (5th Cir. 1948) (coerced confession); *Montalvo v. Hiatt*, 174 F. 2d 645 (5th Cir. 1948); *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946) (improper remarks of counsel in argument); *Boone v. Nelson*, 72 F. Supp. 807 (D. Me. 1947) (coerced confession); *O'Malley v. Hiatt*, 74 F. Supp. 44 (M.D. Pa. 1947); *Beets v. Hunter*, 75 F. Supp. 825 (D. Kans. 1948) (court-martial "saturated with tyranny"); *Flackman v. Hunter*, 75 F. Supp. 871 (D. Kans. 1948) (denial of counsel); *Jackson v. Sanford*, 79 F. Supp. 74 (N.D. Ga. 1947) (denial of counsel); *Randle v. Sanford*, 79 F. Supp. 585 (N.D. Ga. 1946) (inadequate pre-trial investigation); *Durant v. Hiatt*, 81 F. Supp. 948 (N.D. Ga. 1948) (inadequate time in which to prepare defense); *Hayes v. Hunter*, 83 F. Supp. 940 (D. Kans. 1948). Cf. *United States ex rel. Williams v. Barry*, 260 Fed. 291 (S.D. N.Y. 1919). As the only cases in which denials of due process were found to exist are *Hicks v. Hiatt* and *Beets v. Hunter*, the denials of certiorari by the Supreme Court are not significant.

<sup>141</sup> *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947) (denial of continuance to prepare defense). Relief was granted in *Beets v. Hunter*, note 140, *supra*, but it is not clear that the ground was denial of a right under the Fifth or Sixth Amendment.



or questioned this extension.<sup>142</sup>

The problem of whether the expanded scope of inquiry on habeas corpus should be considered to extend to review of judgments of military tribunals involves three questions. The first is whether the Fifth and Sixth Amendments have any application whatever to trials by military tribunals. The language of the amendments, so far as it relates to procedure, appears to be limited to procedure in civil trials for crimes.<sup>143</sup> The concurring opinion of Chief Justice White in *Ex parte Milligan*,<sup>144</sup> in which three other justices joined, stated categorically "the the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment" and the majority opinion stated that the jury trial provision of the Sixth Amendment had no application.<sup>145</sup> The Supreme Court has held that the war powers of the government are not affected

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<sup>142</sup> *Waite v. Overlade*, 164 F. 2d 722 (7th Cir. 1948), *cert. denied*, 334 U.S. 812 (1948) (a carefully reasoned opinion, pointing out that the Supreme Court has cited with approval in recent opinions the older cases declaring a narrow scope of review. Two justices dissented from the Supreme Court's ruling denying certiorari, indicating that the Court considered this a test case.); *United States ex rel. Innes v. Crystal*, 131 F. 2d 576 (2d Cir. 1943) *cert. denied* (case moot), 319 U.S. 755 (1943), *rehearing denied*, 319 U.S. 783 (1943); *Henry v. Hodges*, 171 F. 2d 401 (2d Cir. 1948), *cert. denied*, 69 S. Ct. 937 (1949), *rehearing denied sub. nom. Henry v. Smith*, 69 S. Ct. 1167 (1949) (inadequate pre-trial investigation); *Ex parte Benton*, 63 F. Supp. 808 (N.D. Cal. 1945) (trial judge advocate present at closed session). *Cf. Wrublewski v. McInerney*, 166 F. 2d 243 (9th Cir. 1948); *Richardson v. Zuppan*, 81 F. Supp. 809 (M.D. Pa. 1949). See *Collateral Attack on Courts-Martial in the Federal Courts*, 57 YALE L. J. 483-489 (1948); Fairman, *op. cit.*, note 15, *supra*, 620-623, 631.

<sup>143</sup> Amdt. 5: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life—liberty, or property, without due process of law; . . ."

Amdt. 6: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

<sup>144</sup> 4 Wall. 2, 138 (U.S. 1866). *Accord: Ex parte Benton*, 63 F. Supp. 808 (N.D. Cal. 1945). *Cf. Closson v. United States ex rel. Armes*, 7 App D.C. 460 (1896).

<sup>145</sup> *Ibid.*, 123. *Accord* (as to military trial for violation of the laws of war): *United States ex rel. Quirin v. Cox*, 317 U.S. 1, 29 (1942). See *Zucker v. United States*, 161 U.S. 475, 481 (1896).

by the restrictions imposed by the Fifth and Sixth Amendments.<sup>146</sup> In holding that the trial by jury provision of the Sixth Amendment is inapplicable to trials by military tribunal for violation of the laws or war the Court has recently used language suggesting that none of the guarantees of the Fifth and Sixth Amendments is applicable to military trials.<sup>147</sup> Three years ago it held that the right of confrontation by witnesses given by the Sixth Amendment does not extend to trials by military tribunal and that that right is not guaranteed in such trials by the due process clause of the Fifth Amendment.<sup>148</sup> It is noteworthy that counsel for the defense was not guaranteed by statute in military trials until 1916 and the denial of such counsel was not deemed a violation of the Fifth or Sixth Amendments.<sup>149</sup>

The then Judge Advocate General of the Army made a very thorough study of the question some fifty years ago and reached the conclusion that the due process clause of the Fifth Amendment can have no application to military trials because its guarantee is of the ordinary process of the civil law, that is, the common law concept of a fair trial, a concept which has no meaning in a military situation.<sup>150</sup> Assuming, for the purposes of argument, that the due process clause does have some application to military tribunals, what meaning can it have as applied to them? The courts which hold it does apply concede that it does not guarantee a common law form of trial.<sup>151</sup> The Supreme Court has held that a mili-

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<sup>146</sup> *Miller v. United States*, 78 U.S. 268, 304 (1870). And in *Neely v. Henkel*, 180 U.S. 109, 122 (1901) the Court said that the provisions of the Fifth and Sixth Amendments have no relation to the trial of an American citizen by a tribunal constituted by a United States military government of occupied foreign territory.

<sup>147</sup> *United States ex rel. Quirin v. Cox*, 317 U.S. 1, 39-45 (1942).

<sup>148</sup> *In re Yamashita*, 327 U.S. 1, 18-23 (1946). The dissenting opinions of Murphy and Rutledge, JJ., indicate that they thought the Court was holding that the Fifth Amendment is wholly inapplicable to military trials. *Ibid.*, pp. 26-27, 78-81. See *Homma v. Patterson*, 327 U.S. 759 (1946). Accord (as to courts-martial): *Mullan v. United States*, 42 Ct. Cl. 157, 176 (1907), *aff'd*, 212 U.S. 516 (1909); *Reaves v. Ainsworth*, 219 U.S. 296 (1911). The use of depositions in trials by courts-martial is sanctioned by statute. A.W. 25, § 215, Title II, Act June 24, 1948, 62 STAT. 631, 10 U.S.C.A. §1496. See Covington, *Judicial Review of Courts-Martial*, 7 GEO. WASH. L. REV. 503, 506-507 (1939).

<sup>149</sup> 1 WINTHROP, *MILITARY LAW AND PRECEDENTS* 241 (2d ed. 1896). The argument that a statute conferring a right to counsel imposes a jurisdictional requirement is, of course, wholly different from one that the assistance of counsel provision of the Sixth Amendment or the due process clause of the Fifth imposes such a requirement. See *Hayes v. Hunter*, 83 F. Supp. 940 (D. Kans. 1948).

<sup>150</sup> Lieber, *The Supreme Court on the Military Status*, 31 AM. L. REV. 342, 343-348 (1897).

<sup>151</sup> *United States ex rel. Innes v. Hiatt*, 141 F. 2d 664, 666 (3d Cir. 1944); *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946).

tary tribunal which heard the evidence against the accused in his absence, denied him the right to see or hear the evidence against him, and refused to let him cross-examine the witnesses against him or call any witnesses in his own defense did not deny due process so long as these acts were not prohibited by statute or regulation.<sup>152</sup> It decided that a trial by court-martial in which the same person acted as accuser, prosecution witness and judge was not in excess of jurisdiction.<sup>153</sup> These procedures certainly did not satisfy the common law concept of a fair trial or hearing. It would seem then, that if the due process clause of the Fifth Amendment has any application whatever to military trials, it does nothing more than guarantee the procedure prescribed by statute or regulation. It has been seen that violation of a statute or regulation governing procedure which was intended to be jurisdictional always has been a ground for collateral attack.<sup>154</sup> That being so, even if the expansion of the function of habeas corpus does extend to military cases, it does not actually broaden the pre-existing scope of inquiry.

The third question involved in the problem of whether the broadened scope of habeas corpus extends to military cases is that of the jurisdiction of the reviewing civil courts. The Supreme Court has appellate jurisdiction over the federal courts and, in cases involving federal law, over the state courts. In the absence of Congressional restriction it may exercise such jurisdiction as it chooses. Several of the decisions announcing the expanded function of habeas corpus in civil cases indicate that this is the creation of a new type of appellate review, usable if other forms of appellate review are unavailable or inadequate.<sup>155</sup> But neither the

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<sup>152</sup> *Reaves v. Ainsworth*, 219 U.S. 296 (1911). The case involved a Promotion Board but the opinion is of broader application. It is, of course, unthinkable that Congress or the military authorities would tolerate such procedure in the case of a tribunal with penal power. Discharge of career officers of the Regular Army after a "hearing" of this type is authorized by existing law. §§507, 509, 514, Act Aug. 7, 1947, 61 Stat. 883, 10 U.S.C. §§511, 513, 518 (Supp. 1947). Cf. *Mullan v. United States*, 212 U.S. 516 (1909).

<sup>153</sup> *Keyes v. United States*, 109 U.S. 336 (1883).

<sup>154</sup> Note 130, *supra*. Most of the allegations of denial of due process made in the cases cited in note 140, *supra*, did not involve violation of any procedural statute or regulation. The ground for relief in *Shapiro v. United States*, note 141, *supra*, was the denial of a continuance in which to prepare the defense, no right to which is given by statute or regulation. It was held in *In re Yamashita*, 327 U.S. 1, 58-59 (1946) that such denial of a continuance is not a ground for collateral attack. *Accord* (even when an applicable regulation directs the granting of a continuance under such circumstance): *McMickins v. Shields*, 238 U.S. 99 (1915). The opinions cited in note 140 and 141, *supra*, appear to import alien common law concepts into military law.

<sup>155</sup> *Moore v. Dempsey*, 261 U.S. 86 (1922); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Waley v. Johnston*, 316 U.S. 101 (1942); *Cochran v. Kansas*, 316 U.S.

Supreme Court nor any other civil court has appellate jurisdiction over military tribunals.<sup>156</sup> This being so, the federal civil courts have no power to extend a new form of appellate review over such tribunals. That the expanded function of habeas corpus is inapplicable to review of judgments of military tribunals is implicit in the language of a recent opinion of the Supreme Court.<sup>157</sup>

#### THE EFFECT OF ARTICLES OF WAR 50 AND 53

The rule that a judgment of a court-martial is subject to collateral attack to the same extent as a judgment of a justice of the peace<sup>158</sup> was adopted at a time when the jurisdiction of courts-martial over offenses was narrowly limited, when they numbered no lawyers among their membership, and when their judgments were not subject to appellate review.<sup>159</sup> The jurisdiction of general courts-martial of the Army and Air Force over offenses has been expanded to include all crimes cognizable by a federal district court, the common law crimes, military offenses and violations of the laws of war.<sup>160</sup> In 1920 Congress provided that each general court-martial should have a law member, that every record of trial by general court-martial should be reviewed by the staff judge advocate of the appointing authority, and that every such record should be further reviewed for legal sufficiency, in the Office of the Judge Advocate General, who was given power to reverse convictions.<sup>161</sup> After this the Supreme Court held that the rule which applied to the judgment of a justice of the peace and like inferior tribunals, that it is void on its face unless the record upon which it is based shows all jurisdictional requisites, is inapplicable to the judgment of a general court-martial.<sup>162</sup>

By legislation effective this year Congress provided that the law member of a general court-martial must be an officer of the Judge Advocate General's Corps, or a member of the bar of a

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255 (1942). Presumably the Supreme Court may use federal district courts as its agents for the exercise of its appellate jurisdiction.

<sup>156</sup> Note 4, *supra*.

<sup>157</sup> *In re Yamashita*, 327 U.S. 1, 23 (1946). The dissenting opinions of Murphy and Rutledge, JJ., indicate that they thought the Court's language meant this. *Ibid.*, pp. 30-31, 46, 80. See *Homma v. Patterson*, 327 U.S. 759 (1946).

<sup>158</sup> *Wise v. Withers*, 3 Cranch 331 (U.C. 1806); *Ex parte Watkins*, 3 Pet. 193 (U.S. 1830); *Ex parte Reed*, 100 U.S. 13 (1879).

<sup>159</sup> *Ex parte Mason*, 256 Fed. 384 (C.C. N.D. N.Y. 1882) (no appellate review). See Fratcher, *op. cit.*, note 4, *supra*, 39-40.

<sup>160</sup> A.W. 54-96, §1, ch. II, Act June 4, 1920, 41 STAT. 800, 10 U.S.C. §1526 *et seq.*, as amended by §§231 *et seq.*, Title II, Act June 24, 1948, 62 STAT. 639 *et seq.*

<sup>161</sup> A.W. 46, 50 1/2, §1, ch. II, Act June 4, 1920, 41 STAT. 796, 797, 10 U.S.C. §§1517, 1522.

<sup>162</sup> *Givens v. Zerbst*, 255 U.S. 11 (1921).

federal civil court or the highest court of a state certified by The Judge Advocate General to be qualified, and that the defense counsel must be a lawyer if the trial judge advocate is a lawyer.<sup>163</sup> The same legislation extends the scope of appellate review in the Office of The Judge Advocate General to include the weight and sufficiency of evidence, provides, in effect, that all cases involving confinement for more than one year or any other severe punishment shall be reviewed there by a board of review of not less than three officers of the Judge Advocate General's Corps, and requires further review of serious cases by a Judicial Council composed of three general officers of the Judge Advocate General's Corps and by The Judge Advocate General.<sup>164</sup> The legislation provides, moreover, that, upon application made within one year after the completion of appellate review, The Judge Advocate General may grant a new trial, vacate a sentence, and restore rights, privileges and property affected by such sentence.<sup>165</sup>

It may be that the old scope of collateral attack is still appropriate as to judgments of special and summary courts-martial and military tribunals with no system of appellate review. But it is inappropriate to attribute to a judgment of a general court-martial reviewed in accordance with the statute no more weight than the judgment of a justice of the peace. Certainly a federal district judge who has had no experience or training in military matters should hesitate before overruling on a technical question of military law the considered judgment of general officers of the Judge Advocate General's Corps who have devoted their entire lives to the study and practice of that law. It may be questioned whether the civil courts are well qualified to do justice on such matters. Congress has now declared that the sentences of general courts-martial which have been reviewed in accordance with the statute shall be final and conclusive and that action taken pursuant to them shall be binding upon all courts of the United States.<sup>166</sup> This is a declaration that general courts-martial are no longer inferior tribunals but superior courts of record whose judgments are entitled to the same respect and conclusive effect as those of the superior civil courts. It is submitted that, under this statutory declaration, a duly reviewed sentence of a general court-martial should not be any more subject to collateral attack than a judgment of a federal district court which has been affirmed by a

<sup>163</sup> A.W. 8, 11, §§206, 208, Title II, Act June 24, 1948, 62 STAT. 628, 629, 10 U.S.C.A. §§1479, 1482.

<sup>164</sup> A.W. 50, §226, Title II, Act June 24, 1948, 62 STAT. 635, 10 U.S.C.A. §1521. See Fratcher, *op. cit.*, note 4, *supra*, 62-66.

<sup>165</sup> A.W. 53, §230, Title II, Act June 24, 1948, 62 STAT. 639, 10 U.S.C.A. §1525.

<sup>166</sup> Notes 5, 17, *supra*.

United States Court of Appeals. For the reasons advanced in the preceding section, such a sentence should not be subject to collateral attack for denial of rights guaranteed by the Fifth and Sixth Amendments to the Constitution.